Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Sprint PCS and AT&T Petitions for Declaratory Ruling on CMRS Access Charge Issues	)	WT Docket No. 01-316
	)	

SPRINT PCS REPLY COMMENTS

Luisa L. Lancetti
Vice President, PCS Regulatory Affairs
401 9th Street, N.W., Suite 400
Washington, D.C. 20004
202-585-1923

Charles W. McKee
General Attorney, Sprint PCS
6160 Sprint Parkway
Mail Stop: KSOPHIO414-4A325
Overland Park, KS 66251
913-762-7720

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Summary

In response to the federal court's referral, Sprint PCS addresses three subjects in these reply comments:

• The FCC should advise the court that Sprint PCS may assess access charges and that AT&T has failed to demonstrate that Sprint PCS' rates are unjust or unreasonable. The FCC's "existing policy" is to "forbear from regulating CMRS providers' interstate access charges." As AT&T has acknowledged, the FCC has never ruled that CMRS carriers are prohibited from recovery of their call termination costs from IXCs, and such a ruling would be incompatible with the "calling-party's-network-pays" regime that the FCC has utilized for intercarrier compensation. Accordingly, Sprint PCS may recover access charges from the date that it requested compensation from AT&T, and the FCC should so affirm.

An IXC has the opportunity to show that a particular local carrier's access charges are excessive, but in this particular instance, AT&T has made no showing that Sprint PCS' rates are excessive. Consequently, the FCC should advise the court that the rates Sprint PCS has been billing AT&T are not unreasonable under the Communications Act.

• Sprint PCS is not opposed to the FCC establishing benchmarks or other new rules governing CMRS access charges for the future. However, the FCC should focus its immediate attention on the specific questions that the court has asked regarding existing law. The FCC can then address what changes should be applied to future access charges. In this regard, Sprint PCS discusses some of the rules the FCC might adopt for future CMRS access charges.

• The subject of transit for local calls is not relevant to the questions posed by the court, and the FCC should address the transit issue separately. The FCC should deny the request by the Missouri Independent Telephone Group to address in this proceeding transit issues for local traffic not involving IXCs. The Missouri Group's arguments are erroneous and in any event, are not germane to the issues currently before the FCC and referred by the court.

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Sprint Spectrum. L.P., d/b/a Sprint PCS ("Sprint PCS"), submits this reply to the comments filed in this proceeding.

The Commission commenced this proceeding so it could respond to two questions that a federal court referred to it: "whether Sprint PCS may charge AT&T access fees for use of the Sprint PCS network and, if so, what rate may be reasonably charged for such services."[1] Resolution of these questions requires the Commission to advise the court of the Communications Act law applicable during the period of the Sprint PCS complaint (from 1998 through the present). Some commenters urge the Commission to develop benchmarks and other new rules applicable to CMRS access charges in the future. While Sprint PCS certainly does not oppose adoption of new rules, the Commission must – and should – focus its immediate attention on the specific questions that the court has asked regarding existing law. The Commission can then address what changes should be applied to future access charges.

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[1] *See Public Notice,* "Sprint PCS and AT&T File Petitions for Declaratory Ruling on CMRS Access Charge Issues; Pleading Cycle Established," WT Docket No. 01-316, DA 01-2618 (Nov. 8, 2001), *quoting Sprint Spectrum L.P.* v. *AT&T Corp.,* Civil Action No. 00-00973-W-5, Order at 11 (W.D. Mo., July 24, 2001)("*Primary Jurisdiction Referral Order*").

I. THE RECORD IS NOW RIPE FOR THE COMMISSION TO ANSWER THE TWO QUESTIONS THAT THE COURT HAS POSED TO IT

The court has referred two questions to the Commission: (1) Did Sprint PCS have the right to assess access charges on AT&T between 1998 and the present, and (2) if so, are the rates that Sprint PCS assessed unreasonable under Section 201 of the Communications Act? As demonstrated below, based on the existing record, including the comments submitted by AT&T and other interexchange carriers ("IXCs"), the Commission should promptly advise the court that:

1. The FCC's "existing policy" is to "forbear from regulating CMRS providers' interstate access charges."[2] The FCC has never ruled that CMRS providers are prohibited from recovering their call termination costs from IXCs, and such a ruling would have been incompatible with the "calling party's-network-pays" ("CPNP") regime that the FCC has utilized for intercarrier compensation. Consequently, Sprint PCS may recover access charges from the date that it requested compensation from AT&T; and
2. An IXC has the opportunity to show that a particular local carrier's access charges are excessive, but in this particular instance, AT&T has made no such showing regarding Sprint PCS' rates. Accordingly, the rates that Sprint PCS has been billing AT&T are not unreasonable under the Communications Act.

A. SPRINT PCS' ACCESS CHARGES ARE NOT UNLAWFUL

AT&T argued before the court that the access charges Sprint PCS was billing were unlawful under Section 201 of the Communications Act because, it said, such charges are incon-

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[2] *LEC-CMRS Interconnection NPRM*, 11 FCC Rcd 5020, 5075-76 ¶ 117 (1996).

sistent with "the Communications Act" and "FCC policies."[3] Sprint PCS responded that CMRS access charges were lawful, but simply not regulated. The court decided to refer this question to the FCC:

> The crux of the dispute in this case involves whether Sprint may charge AT&T access fees for use of the Sprint PCS network . . . . Based on the foregoing discussion, these issues should be referred to the FCC for determination under the doctrine of primary jurisdiction, as they involve matters within the agency's special expertise and which require a uniform resolution.[4]

AT&T has changed the theory of its defense now that it is before the Commission. AT&T no longer argues that CMRS access charges are inconsistent with "FCC policies." It rather contends that the FCC "has never held that CMRS providers should charge IXCs, instead of end users, for access."[5]

Of course, the FCC has never held that CMRS carriers "should" charge IXCs or end users, because such a ruling would have been inconsistent with its policy of forbearance. The FCC has unequivocally stated, however, that CMRS carriers may impose access charges if they choose:

> The Commission recently determined that the CMRS marketplace is sufficiently competitive to support forbearance from a tariff filing requirement for CMRS interstate access service. It should be noted, however, that in the Interconnection Order, the Commission stated that *cellular carriers are entitled to just and reasonable compensation for their provision of access.*[6]

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[3] *See* AT&T Answer and Counterclaim, at 7 ¶ 6 and 9 ¶ 16, *quoted at* Sprint PCS Opposition at 3.

[4] *Primary Jurisdiction Referral Order* at 11.

[5] AT&T Comments at 3.

[6] *CMRS Equal Access/Interconnection,* 9 FCC Rcd 5408, 5447 ¶ 93 (1994)(emphasis added). AT&T asserts that this paragraph recognized only that CMRS carriers are entitled to compensation and that the issue of who should pay these costs – IXCs or end users — was instead addressed in paragraph 95. *See* AT&T Comments at 10-11. AT&T is mistaken, because paragraph 95 dealt with the recovery of equal access conversion costs rather than the recovery of ordinary call termination costs. (The costs of equal access for originating toll calls are different than the costs associated with call termination.) Besides, even if the two types of costs could be equated, the FCC gave CMRS carriers the choice to recover

Although Qwest opposes CMRS access charges, it does acknowledge that its access tariff expressly provides for the joint provision of access with a CMRS provider.[7] Any other arrangement would be unreasonably discriminatory against CMRS carriers. Neither Qwest, nor any other IXC, has provided a rational policy justification for permitting every type of telecommunications carrier, except CMRS carriers, to recover their cost of providing exchange access.

Importantly, CMRS carriers may collect their costs of call termination even if the Commission were to assume that AT&T is correct – namely, the FCC has "never addressed" whether CMRS carriers may imposes access charges. CMRS rates are not regulated, and the FCC's "existing policy" is to "forbear from regulating CMRS providers' interstate access charges."[8] If CMRS rates are not regulated and even if (as AT&T says) the FCC has "never addressed" the subject of access charges, it still necessarily follows that CMRS carriers may lawfully impose access charges.[9] This is particularly the case where, as here, "traditional economic analysis and Commission precedent have favored CPNP intercarrier compensation regimes."[10] An IXC always has the opportunity to file a complaint if it believes that a carrier's access charges are excessive but, as discussed below, AT&T has made no attempt to demonstrate that Sprint PCS' rates are excessive.

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equal access conversion costs from "either equal access interexchange customers or end users." 9 FCC Rcd at 5447 ¶ 95.

[7] *See* Qwest Comments at 12 n.27, *citing* Qwest Tariff F.C..C. No. 1, § 2.4.8.

[8] *LEC-CMRS Interconnection NPRM*, 11 FCC Rcd 5020, 5075-76 ¶ 117 (1996).

[9] WorldCom's assertion that the FCC must explicitly "approve" access charges before CMRS may impose such charges – during a time when the FCC policy was to "forbear from regulating CMRS providers' interstate access charges" and during a time when CPNP was the prevailing form of intercarrier compensation – is unsupported by law and is absurd on its face. *See* WorldCom Comments at 1-3.

[10] *Unified Intercarrier Compensation NPRM,* 16 FCC Rcd 9923, ¶ 98 (April 27, 2001). The FCC is currently examining whether to replace CPNP with bill-and-keep, including for access provided to IXCs, but the fact that the FCC is discussing this possibility for the future only reinforces that CPNP for CMRS access is in place today.

AT&T advances several policy arguments which, it contends, should lead the FCC to rule that CMRS access charges should not be permitted.[11] Again, even if these arguments had merit (and they do not), they would *at most* authorize the Commission to prohibit CMRS access charges on a *prospective* basis. Having adopted of policy of "forbearing from regulating CMRS providers' interstate access charges,"[12] and given "the strong support CPNP regimes have received from the economic literature and from Commission precedent,"[13] the Commission cannot now decide that CMRS access charges are unlawful during period that the policy of forbearance was in effect. Such a ruling would constitute impermissible retroactive rulemaking as Sprint PCS has previously documented.[14]

Several of AT&T's policy arguments require a brief response.[15] AT&T contends that it would be "manifestly unjust" for it to pay access charges for the past because the "industry practice during the period of this dispute was one in which wireless carriers did not bill IXCs for access":

> AT&T justifiably relied on the reasonable expectation that it would not have to make such payments when it set its rates. AT&T has no way now to retroactively

[11] *See* AT&T Comments at 18-26.

[12] *LEC-CMRS Interconnection NPRM*, 11 FCC Rcd at 5075-76 ¶ 117.

[13] *Unified Intercarrier Compensation NPRM,* 16 FCC Rcd 9923 at ¶ 98.

[14] *See* Sprint PCS Opposition at 5 and n.19. Of course, the FCC has the authority to determine whether Sprint PCS' past access charges were excessive. *See, e.g., AT&T* v. *Business Telecom,* 16 FCC Rcd 12312 at ¶¶ 9-12 (May 25, 2001). But the FCC could not retroactively establish the rate at zero as AT&T contends, given its concession that "Sprint PCS undoubtedly incurs costs in delivery calls to and from AT&T's network." AT&T Declaratory Ruling Petition at 14.

[15] Many of AT&T's policy arguments require no response. For example, AT&T says that the FCC has "repeatedly recognized that wireless carriers do not today provide a service that competes with the ILECs' local exchange service" because CMRS rates are too high, but then says in the very next paragraph that access charges are not necessary for CMRS carriers to complete meaningfully with LECs. *See* AT&T Comments at 23-24.

> increase its rates for those past periods, and thus would have no way to recover the costs of paying Sprint PCS for past periods.[16]

This argument, however, does not fit the facts of this case. Sprint PCS advised AT&T in 1998 that it expected to be paid for the costs AT&T was imposing on Sprint PCS. Although AT&T had full (and repeated) notice that Sprint PCS expected payment, it was AT&T that decided to continue to route its traffic to Sprint PCS for call completion without paying the charges that Sprint PCS had requested. Thus, AT&T cannot be heard to complain that it "justifiably relied" and held a "reasonable expectation" that it would not have to pay Sprint PCS – especially given AT&T's concession that "Sprint PCS undoubtedly incurs costs in delivering calls to and from AT&T's network."[17]

It also bears emphasis that Sprint PCS faces the same business risk as AT&T. Many IXCs have paid Sprint PCS' access charges and if the FCC were to rule that such charges are unlawful, these IXCs will undoubtedly demand refunds for past access payments. If Sprint PCS was compelled to make such refunds, it would (in AT&T's words) have "no way now to retroactively increase its rates for those past periods, and thus would have no way to recover the costs of paying [IXC refunds] for past periods."[18]

AT&T further asserts that Sprint PCS seeks a "windfall" and that by granting relief to Sprint PCS, the Commission would be establishing discrimination within the toll industry – specifically between AT&T and Sprint's long distance company.[19] There would be no windfall to Sprint nor would there be any discrimination. The Sprint long distance company, unlike AT&T,

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[16] AT&T Comments at 22.

[17] *See* AT&T Declaratory Ruling Petition at 14.

[18] AT&T Comments at 22. AT&T is therefore wrong in asserting that "there would no unfairness to [Sprint PCS] if the Commission rules that the existing end-user pays system should continue." *Id.*

[19] *See* AT&T Comments at 21-22.

has paid Sprint PCS' access charges. Like AT&T, the Sprint long distance company has not paid access charges to AT&T's former affiliate, AT&T Wireless. But, AT&T Wireless has chosen not to assess access charges, as is its right. There is no reason for any IXC to begin paying access charges to any CMRS carrier until a CMRS provider specifically requests payment of costs incurred.[20] It was not an "unreasonable practice" for Sprint long distance company to refrain from performing billing on behalf of carriers that were not seeking compensation. The failure of an IXC to pay CMRS access charges cannot be unreasonable under the Act unless the CMRS provider specifically requests compensation for costs incurred.

There is a "windfall" with the subject of CMRS access charges, but the "windfall" is currently enjoyed by AT&T and other IXCs that are not paying Sprint PCS' charges. As Sprint PCS has explained, AT&T's free access service proposal would result in "both the calling party and the person being called [paying] for call termination – in short, consumers would pay twice":

> According to AT&T, the costs Sprint PCS incurs in terminating AT&T traffic should be paid by the Sprint PCS customers receiving the AT&T toll calls. But, the prices that AT&T charges its own customers who call Sprint PCS customers also include an expense for terminating switched access. Thus, AT&T wants the Commission to approve an arrangement where it can overcharge its own customers, obtain free service from Sprint PCS, and pocket the overcharge.[21]

For its part, WorldCom asserts that CMRS access charges would "significantly increase the costs of providing interexchange service" because, it says, such charges "could" amount to "nearly a billion dollars per year."[22] According to FCC data, the "total long distance market was more than $108 billion" in 2000.[23] Thus, even assuming the accuracy of WorldCom's unsup-

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[20] Indeed, Section 201(a) specifies that its obligations are triggered only when a carrier receives a "reasonable request." 47 U.S.C. § 201(a).

[21] Sprint PCS Opposition at 7.

[22] WorldCom Comments at 11.

[23] *See* Industry Analysis Division, *Trends in Telephone Service,* at 10, § 10.1 (Aug. 2001).

ported estimate, CMRS access charges would constitute less than one percent of total toll revenues. And, if the Commission adopts benchmarks based on NECA rates (as Sprint PCS recommends below), CMRS access charges would fall as ILECs further reduced their access charges in the future.

In summary, given the current CPNP regime, and given the FCC's "existing policy" of "forbearing from regulating CMRS providers' interstate access charges,"[24] Sprint PCS submits that the Commission should advise the court that a CMRS carrier may impose access charges (after it specifically requested recovery of its call termination costs).

B. AT&T Still Has Not Attempted to Demonstrate that Sprint PCS' Rates Are Unreasonable

Sprint PCS has been charging AT&T for interstate traffic the access charge rate set forth in the NECA tariffs for Tier 1 LECs. Although this rate is less than its actual costs of call termination (based on its TELRIC studies[25]), Sprint PCS determined that the NECA rate is a reasonable surrogate. Since Sprint PCS terminates AT&T traffic to its customers regardless of their location at the time of the call (whether located in a city, a suburb or rural area), the NECA Tier 1 LEC rate is a reasonable blended rate for CMRS call termination.[26]

AT&T nonetheless asserted to the court that Sprint PCS' rates were unjust and unreasonable, and the court accepted AT&T recommendation to refer its rate level claim to the FCC:

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[24] *LEC-CMRS Interconnection NPRM*, 11 FCC Rcd 5020, 5075-76 ¶ 117 (1996).

[25] Like Sprint PCS, AT&T supports use of TERLIC. *See* AT&T Declaratory Ruling Petition at 24 ("[R]ates based on TELRIC best replicate the prices that would be charged by carriers subject to competitive market pressures, and best ensure an efficient utilization of the service in question.").

[26] In addition, Sprint PCS provides voice mail services to its customers at no extra charge. Thus, AT&T will receive toll revenues on virtually all calls made to Sprint PCS customers, even if they do not personally answer the phone at the time of the call.

> [AT&T] alleges that Sprint's access rates are unreasonable, and thus in violation of Section 201 of the Communications Act. . . . This is clearly a fact that must be proven and one which the FCC is in a better position than the Court to evaluate.[27]

Sprint PCS' rates are not regulated,[28] and AT&T has the burden of demonstrating that Sprint PCS' rates are unreasonable and therefore, unlawful.[29] AT&T made no attempt in its October 22, 2001 petition to demonstrate that Sprint PCS' rates are unreasonable, and Sprint PCS explained in its opposition that the Commission must accordingly dismiss this AT&T complaint for failure to meet its burden of proof.[30] AT&T again makes no attempt in its November 30, 2001 comments to show that Sprint PCS' rates are unreasonable. The decisions AT&T cites in its comments confirm that the Commission must reject AT&T's unreasonable rate arguments for failure to submit any proof.[31]

Given AT&T's complete failure to satisfy its burden of proof, the Commission should advise the court that Sprint PCS' rates for toll call termination are neither unjust nor unreasonable under Section 201 of the Communications Act.

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[27] *Primary Jurisdiction Referral Order* at 2 and 8.

[28] *See, e.g., Year 2000 Biennial Review - Amendment of Part 22,* 16 FCC Rcd 11169, at ¶ 60 (May 17, 2001)("CMRS licensees are not subject to federal rate regulation."); *LEC-CMRS Interconnection,* 11 FCC Rcd 5020, 5075-76 ¶ 117 (1996).

[29] *See* Sprint PCS Opposition at 9 and n.30.

[30] *See id.* at 9 and n.32.

[31] *See* AT&T Comments at 17, *citing Kiefer* v. *PageNet,* File No. EB-00-TC-F-002, at ¶¶ 5 and 12 (Oct. 18, 2001)("[B]eyond his bald assertions, we find that Mr. Kiefer has failed to cite any authority or present any evidence requiring PageNet's late fee to be based on an estimate of its actual losses. * * * We find that Mr. Kiefer has not demonstrated that PageNet's assessment of the $5.00 late fee violates section 201(b) of the Act. We therefore deny with prejudice the instant formal complaint.").

C. AT&T'S LEGAL ARGUMENTS ARE IRRELEVANT TO THE QUESTIONS THE COURT HAS REFERRED TO THE COMMISSION

AT&T devotes most of its comments to legal arguments that have no bearing on the two questions that the court has referred to the Commission.[32] For example, AT&T asserts that while the Commission may adjudge Sprint PCS as contravening the Communications Act for attempting to recover its costs of terminating AT&T calls,[33] the FCC cannot find AT&T in violation of the Act because it has not paid these costs.[34]

AT&T's position is actually more troubling because it is effectively arguing that it is *beyond the law.* Specifically, AT&T asserts that Sprint PCS may not file a collection action in state or federal court because the question of access charges is "within the exclusive jurisdiction of the Commission."[35] AT&T then asserts that the FCC cannot adjudge it liable under the Communications Act because it characterizes itself as a "customer" of Sprint PCS.[36] AT&T thus

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[32] AT&T appears to be engaged in continued gamesmanship. For example, it told court that the FCC had ruled had CMRS access charges are unlawful, but now before the FCC, it instead asserts only that the FCC "never addressed" the issue. AT&T argued to the FCC in October the bill-and-keep was "preferable as a matter of economic theory," when it told the FCC in August the bill-and-keep "simply cannot make economic sense." *See* Sprint PCS Opposition at 7. In addition, having successfully removed Sprint PCS' case from the state courts, AT&T waits until it is before the FCC before arguing that state courts have no authority to entertain Sprint PCS' collection action (even though this question would appear to be moot given that AT&T successfully removed Sprint PCS' case to federal court).

[33] *See* AT&T Comments at 7 ("AT&T specifically pled a claim under Section 201(b) of the Act, alleging that Sprint PCS engaged in an 'unreasonable practice' when it unilaterally sought to recover its costs."

[34] *See id.* at 12-17.

[35] AT&T Comments at 7. *But see* 47 U.S.C. §§ 206-07 (giving federal district courts and FCC concurrent jurisdiction).

[36] *See id.* at 13-17. AT&T places great reliance on *Illinois Bell* v. *AT&T,* 4 FCC Rcd 5268 (1989), and that Sprint Corporation cited this case in a pleading before settling another case. *See id.* However, as AT&T's extensive quotation from the *Illinois Bell* case makes apparent, that decision does not apply here because the complainants in that case "do not allege that AT&T, in its role as a carrier, acted or failed to act in contravention of the Communications Act." AT&T Comments at 14, *quoting Illinois Bell,* 4 FCC Rcd at 5270 ¶ 18. Indeed, the Act expressly authorizes the FCC "to establish through routes and charges applicable thereto and the division of such charges." 47 U.S.C. § 201(a).

claims that Sprint PCS cannot recover from AT&T amounts owed in any forum or under any legal theory. In short, AT&T says that it is beyond the law and that as a result, it can continue to obtain free access from Sprint PCS.

The only two issues that the court has referred to the Commission are the two questions enumerated above – indeed, the very two questions that AT&T had specifically urged the court to refer to the Commission. None of the legal arguments that AT&T makes in its comments are relevant to these questions, and Sprint PCS submits that the Commission should respond to the two questions posed and leave AT&T to make its other arguments on another day and in the proper forum.

II. SPRINT PCS IS NOT OPPOSED TO THE COMMISSION ESTABLISHING BENCHMARKS OR OTHER NEW RULES GOVERNING CMRS ACCESS CHARGES IN THE FUTURE

Sprint PCS urges the Commission to focus its immediate resources on the two questions that the court has referred to it.[37] Nevertheless, Sprint PCS is not opposed to certain commenting parties' requests that the Commission establish in this proceeding (as opposed to the *Unified Intercarrier Compensation* docket) benchmarks and other new rules governing CMRS access charges – so long as these additional steps do not delay the Commission's response to the court.

At the outset, Sprint PCS agrees with the IXCs that the concept of bill and keep should be considered for all intercarrier compensation. As outlined in Sprint's comments in the *Intercarrier Compensation NPRM*, however, conversion of the access charge regime to bill and keep presents many issues that must be resolved before such a step could occur. Accordingly, the Commission should not adopt bill-and-keep for CMRS-IXC interconnection unless and until it adopts

[37] While the court has stayed the litigation through June 24, 2002, it has further stated that if "by that time, the FCC has not ruled on the referred issues, this Court will proceed with the instant litigation."

bill-and-keep for LEC-IXC interconnection.[38] Mobile wireless services, the Chairman has noted, present the "best hope" for real competition with fixed landline services,[39] and this LEC-CMRS competition would be distorted if LECs receive their access costs while CMRS carriers do not.[40] In addition, the prices IXCs charge their customers for toll calls to CMRS carriers include a cost component for access charges, when IXCs have not paid access charges to CMRS providers. Thus as noted above, the bill-and-keep regime that certain IXCs favor in the immediate future would result in both parties to a toll call paying for the same expense: the mobile customer being called pays the CMRS carrier for the cost of call termination, and the calling party pays the IXC rates which include access charges (which IXCs pocket as profit because they have not paid access charges to CMRS carriers).

Qwest recommends that the Commission adopt benchmarks to address the terminating monopoly issue.[41] Sprint PCS agrees, because every carrier possesses an effective monopoly in the provision of the call termination function to called parties that it serves. The Commission can address this terminating monopoly issue in one of two ways: it can address the reasonable rate level question *ad hoc* in a series of Section 208 complaint cases (as it did initially with the

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Primary Jurisdiction Referral Order at 13. The two questions that the court has posed are straightforward, and Sprint PCS believes the FCC can provide a timely response.

[38] Many of the arguments IXC recite in support of bill-and-keep require no response, including "wireless competition would suffer" if CMRS carriers recovered their costs of toll call termination (WorldCom at 10), and by adopting bill-and-keep, the FCC would save the CMRS industry from spending money on billing and the FCC would have less work (Qwest at 2-3 and 9-10).

[39] *See* Chairman Michael K. Powell, "Digital Broadband Migration Part II" (Oct. 23, 2001).

[40] Qwest's argument – "bill-and-keep rules thus would permit carriers to compete solely on their economic and technological merits, rather than based an advantages conferred by regulation" (Comments at 4) – would be accurate only when LECs move to bill-and-keep. If LECs can impose access changes when CMRS carriers cannot, LECs would, in Qwest's words, possess "an advantage conferred by regulation."

[41] *See* Qwest Comments at 5-7.

CLEC-IXC disputes), or it can adopt a "safe harbor" benchmark in one order, as it did recently in the *CLEC Access Charge Order*.

Sprint PCS agrees with AT&T that, similar to the regime used with local interconnection, CMRS carriers should be able to base their access rates on their TERLIC call termination costs.[42] As demonstrated in its state cost study filings, Sprint PCS' TELRIC costs are in fact higher than the access rates it has used as a proxy. The real issue that the Commission needs to address is the appropriate "safe harbor" benchmark for CMRS-IXC interconnection when a CMRS carrier does not have a TELRIC cost study available. IXCs uniformly argue that the benchmark should be the rate used with local interconnection.[43] However, there are fundamental flaws with this IXC proposal, including:

(a) The FCC has held that access charges, and not reciprocal compensation, apply to interexchange traffic carried by IXCs.[44] LECs, including CLECs, do not apply their reciprocal compensation rates to IXC traffic, and there can be no principled reason for requiring CMRS providers to do so.

(b) In advocating the use of the TELRIC rate used with local interconnection, the FCC must understand that IXCs are advocating that CMRS carriers be compelled to use as their access charge the TELRIC rate that *incumbent LECs* use for terminating local traffic.[45] CMRS carriers use a very different network architecture

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[42] *See* AT&T Declaratory Ruling Petition at 27.

[43] *See* Qwest Comments at 9 and WorldCom Comments at 11-13. *See also* AT&T Declaratory Ruling Petition at 20-27.

[44] *See First Local Competition Order,* 11 FCC Rcd at 15598-99 ¶¶ 190-91.

[45] Under the symmetrical compensation rules, CMRS carriers receive in reciprocal compensation the same rate they pay to LECs for call termination. *See* 47 C.F.R. § 51.711(a).

than LECs that are demonstratively more expensive to operate,[46] and use of the ILEC local compensation rate would virtually guarantee that CMRS carriers would not begin to recover their actual costs of toll call termination while incumbent LECs would be recovering their costs; and

(c) LECs, against which CMRS carriers compete, generally impose a higher price for access charges than the price they assess for local call termination. CMRS providers cannot meaningfully compete with LECs if they receive less than the LEC in terminating the same toll calls.

The solution that the Commission adopted for CLECs – use as a surrogate the corresponding rate that an ILEC assesses in the same market – is not workable for CMRS carriers. Sprint PCS, like most CMRS providers, terminates a call regardless of the customer's location at the time (*e.g.,* Maine, Florida, California or Washington). It would be administratively impossible for CMRS carriers to compute the appropriate ILEC rate for any given toll call, given that there are over 1,200 ILECs across the country. Sprint PCS therefore recommends that the Commission adopt as the "safe harbor" benchmark the rate that it has chosen as a surrogate: the NECA rate for Tier 1 LECs. This nationwide rate is below the costs Sprint PCS incurs in performing the call termination function (using a TELRIC methodology), but this rate provides a useful "blended" rate that encompasses call termination costs in cities, suburbs and rural areas.

Some parties have suggested that the FCC amend its rules to permit CMRS carriers to submit access tariffs if the access charge is within the approved benchmark.[47] Sprint PCS is not opposed to this recommendation, so long as tariffs remain *optional* for CMRS carriers. Sprint

[46] *See, e.g., Unified Intercarrier Compensation NPRM,* 16 FCC Rcd 9923, at n.166 and ¶ 104.

PCS questions the need for tariffs or CMRS-IXC contracts if the FCC order in this proceeding is sufficiently clear. Given the availability of the complaint procedure, no CMRS carrier would have any incentive to impose higher access charges above the benchmark (unless it had prepared a TELRIC cost study). Thus, Sprint PCS cannot agree with Qwest that adoption of a "CLEC access charge" model applicable to the CMRS industry "would result in substantial transaction costs," whether to CMRS carriers, IXCs, or the Commission.[48]

III. THE SUBJECT OF TRANSIT FOR LOCAL CALLS IS NOT RELEVANT TO THE QUESTIONS POSED BY THE COURT, AND THE COMMISSION SHOULD ADDRESS THE TRANSIT ISSUE SEPARATELY

The Missouri Independent Telephone Group ("MITG"), while supporting the Sprint PCS petition against AT&T, invites the Commission to address an additional issue not raised by the AT&T and Sprint PCS declaratory ruling petitions – namely, an incumbent LEC's reciprocal compensation obligations for local traffic not handled by an IXC. There are two problems with the MITG position: it is (a) legally erroneous, and (b) not germane to the issues that the court referred to the Commission.[49]

(a) *MITG's Position Is Legally Erroneous.* The MITG takes the position that its members can impose access charges on Sprint PCS and other CMRS carriers when its members terminate intraMTA mobile-to-land calls – unless the CMRS provider interconnects directly with

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[47] *See* Qwest Comments at 8, *citing* VoiceStream Reply Comments, Docket No. 01-92, at 19 (Nov. 5, 2001).

[48] *See* Qwest Comments at 8.

[49] The FCC should be aware that the MITG's summary of the interconnection dispute in Missouri (*see* Comments at 7-9) is neither complete nor entirely accurate, but this pleading is not the appropriate place to complete the history.

each MITG member.[50] The MITG is mistaken for two independent reasons. First, the reciprocal compensation obligations of incumbent LECs apply to *all* intraMTA traffic exchanged between a LEC and a CMRS provider. FCC Rule 51.703(a) provides that "[e]ach LEC shall establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic with any requesting telecommunications carrier."[51] Rule 51.701(b) specifies that reciprocal compensation, not access charges, applies to traffic "exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area."[52] The FCC has not, as MITG wants to believe, created a "carve out" whereby only *some* intraMTA traffic is subject to reciprocal compensation (direct interconnection) while other intraMTA traffic is instead subject to access charges (indirect interconnection). To the contrary, as the Commission reaffirmed earlier this year:

> [R]eciprocal compensation, rather than interstate or intrastate access charges, applies to LEC-CMRS traffic that originates and terminates within the same Major Trading Area (MTA).[53]

The Commission has also noted that "CMRS carriers also originate and terminate three-carrier calls, some of which are governed by reciprocal compensation,"[54] thereby directly rejecting the MITG argument that all three-carrier intraMTA calls are subject to access charges.[55]

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[50] *See, e.g.,* MITG Comments at 11 ("[R]eciprocal compensation applies only when used between two directly interconnected carriers . . . . All LECs are entitled to insist upon access compensation until there is an interconnection agreement constructed upon a direct interconnection.").

[51] 47 C.F.R. § 51.703(a).

[52] 47 C.F.R. § 51.701(b)(2).

[53] *Intercarrier Compensation of ISP-Bound Traffic,* 16 FCC Rcd 9151, at ¶ 47 (April 27, 2001). *See also First Local Competition Order,* 11 FCC Rcd 15499, 16016 ¶ 1043 (1996)("[T]raffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call), is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges."). The FCC has further made clear that the reciprocal compensation obligation applies to "all exchange carriers, including small incumbent LECs." *Id.* at 16018 ¶ 1045.

Second, the MITG is mistaken in claiming that its members possess the "right" to force other carriers to connect directly to their members.[56] Rural ILECs cannot force CMRS carriers to interconnect directly with them, any more than CMRS carriers have a right to compel rural LECs to connect directly with their CMRS networks. Congress has expressly recognized that Sprint PCS and other competitive carriers can choose to interconnect indirectly with other carriers (such as MTIG's members),[57] and the FCC has reaffirmed that for CMRS carriers, "indirect interconnection . . . is all that is required by the 1996 Act."[58] Indeed, the MTIG's own state commission has recognized that "indirect interconnection between CMRS carriers and small LECs, though a large LEC's tandem switch, is the only economically feasible means of interconnection available."[59] In summary, if the Commission decides to address the MITG argument, it must reject that argument based on the governing statute and all available precedent.

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[54] *Unified Intercarrier Compensation NPRM,* 16 FCC Rcd 9923 at ¶ 71 (April 27, 2001).

[55] Federal courts have also rejected MITG's arguments. *See 3 Rivers Telephone* v. *U S WEST,* 125 F. Supp. 2d 417, 418 (D. Mont. 2000)("[N]o local exchange company, including U S WEST or the plaintiffs, may levy access charges against wireless carriers by Order of the Federal Communications Commission.").

[56] *See* MTIG Comments at 10. "Interconnection is direct when a carrier's facilities or equipment is attached to another carrier's facilities or equipment. Interconnection is indirect when the attachment occurs through the facilities or equipment of an additional carrier or carriers." *Advanced Telecommunications Capability Reconsideration Order*, 15 FCC Rcd 17806, 17845 n.198 (2000).

[57] *See* 47 U.S.C. § 251(a)(1). The MITG also misreads Section 251(c)(2)(B). While this statute gives a competitive carrier the right to interconnection "at any technically feasible point within the . . . network" of ILECs subject to Section 251(c), this statute does not *require* interconnection "within" an ILEC's network. Indeed, such a reading would be inconsistent with the provisions of Section 251(a)(1).

[58] *Fourth CMRS Interconnection Order,* 15 FCC Rcd 13523, 13534 ¶ 28 (2000). *See also First Local Competition Order,* 11 FCC Rcd 15499, 15991 ¶ 997 (1996). *But see* MITG Comments at 13 ("The Act does not require an ILEC to involuntarily accept local compensation arrangements constructed upon indirect interconnections.").

[59] *Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service,* Report and Order, Case No. TT-2001-139 (Feb. 8, 2001), *reh, denied,* Order Denying Rehearing (March 7, 2001). The FCC has recognized the same point. *See, e.g., Unified Intercarrier Compensation NPRM,* 16 FCC Rcd 9923 at n.148; *Number Portability Reconsideration Order,* 12 FCC Rcd 7236, 7305 n.399 (1997). Indeed, Sprint PCS suspects that MITG member switches do not have sufficient ports to support direct interconnection with each carrier that sends traffic to MITG members.

(b) *The MITG's Arguments Are Not Legally Relevant in Any Event.* The issue in this docket involves CMRS access charges to IXCs. The MITG, however, also wants the FCC to address compensation issues for local calls not handled by IXCs — that is, where a CMRS carrier delivers its calls to a MITG member *via* indirect interconnection (using the tandem switch of the dominant ILEC in the area). In an attempt to fit its arguments within the parameter of this proceeding, MITG asserts that IXCs provide a "transit" function.[60] The MITG is mistaken.

Transit involves a situation where the intermediate carrier, usually the ILEC owning the LATA tandem switch, does not have a customer relationship with either the calling or called parties.[61] Transit services are not used when two local carriers (*e.g.,* a LEC and CMRS carrier) interconnect directly with each other. Transit services are rather used when the two local carriers interconnect indirectly – that is, when the originating LEC/CMRS carrier determines that it is more efficient to deliver its traffic to the terminating carrier *via* the LATA tandem switch. Transit/tandem switch services are considered "transport" under the Act and implementing rules.[62] The transit provider obviously should be compensated for the tandem switching services offered, and the responsibility for compensating the transit provider appropriately falls on the originating

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[60] *See, e.g.,* MITG Comments at 6, 13 and 15.

[61] Transit is also used in other settings. *See, e.g., AT&T/British Telecom,* 14 FCC Rcd 19140, 19177 n.168 (1999)("Transit allows a carrier in one country, the originating carrier, to route traffic to a carrier in another country, the destination carrier, through a carrier in a third country, the transit carrier. The originating carrier pays a transit fee to the transit carrier for delivering the traffic to the destination carrier."); *MCI/WorldCom,* 13 FCC Rcd 18025, 18106 ¶ 146 (1998)("The alternative to peering is a paying transit relationship. A transit arrangement differs from peering in two respects. First, in contrast to a peering arrangement in which IBPs generally exchange traffic without charge, in a transit arrangement one IBP pays the other IBP to carry its traffic. The amount of this charge depends upon the capacity of the connection. Second, in contrast to a peering arrangement in which IBPs only terminate each other's traffic, in a transit arrangement an IBP agrees to deliver all Internet traffic that originates or terminates on the paying IBP regardless of the destination or source of that traffic.").

[62] *See, e.g.,* 47 C.F.R. § 51.701(c)("[T]ransport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act.").

carrier (since it is that carrier that chooses to use the particular transit services rather than use alternatives such as direct interconnection).

While interexchange calls also often involve three carriers, an IXC is not a transit carrier because the IXC has a customer relationship with the calling party. With interexchange calls, it is the originating local carrier that effectively provides a transit function (although this function is more commonly referred to as exchange access), because it is the IXC that chooses to serve its customers using the local carrier rather than providing its toll services directly to its calling customers.

The subjects of transit and interexchange calls, while related, nevertheless raise different legal and policy questions. The subject of transit is currently being considered in the *Unified Intercarrier Compensation NPRM.*[63] Given the numerous issues being addressed in that docket, coupled with the important role that transit services play in the public telecommunications network, Sprint PCS would certainly welcome a FCC proceeding devoted exclusively to transit issues.

But this proceeding involves interexchange calls, and the Commission has an obligation to respond to specific judicial questions by a specified date. The Commission should not broaden the scope of this proceeding, at least until it answers the two questions that the court has posed.

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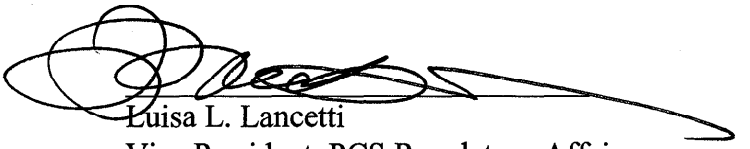
[63] *See Unified Intercarrier Compensation NPRM,* 16 FCC Rcd 9233 at ¶ 71.

IV. CONCLUSION

For the foregoing reasons and those set forth in Sprint PCS' declaratory ruling petition, the Commission should enter an order advising the federal court that Sprint PCS' access charges are not unlawful under the Communications Act and that AT&T has not demonstrated that Sprint PCS' prices for its access services are unjust or unreasonable.

Respectfully submitted,

SPRINT SPECTRUM L.P., d/b/a Sprint PCS



Luisa L. Lancetti
Vice President, PCS Regulatory Affairs
401 9th Street, N.W., Suite 400
Washington, D.C. 20004
202-585-1923

Charles W. McKee
General Attorney, Sprint PCS
6160 Sprint Parkway
Mail Stop: KSOPHIO414-4A325
Overland Park, KS 66251
913-762-7720

December 12, 2001

CERTIFICATE OF SERVICE

I. Jo-Ann Monroe, do hereby certify that on this 12th day of December 2001 copies of the foregoing "Sprint PCS Reply Comments" were served by Electronic and First Class U.S. Mail, postage prepaid to:

Daniel Meron
Jennifer M. Rubin
Sidley Autstin Brown & Wood
1501 K Street, N.W.
Washington, D.C. 20005
E-mail: Dmeron@sidley.com; JMRubin@sidley.com

Jo-Ann Monroe